BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of Court of Common Pleas of Philadelphia will be found in the Record herewith submitted at pages 197a to 202a.

The opinion of the Supreme Court of Pennsylvania has not as yet been officially recorded in the State Reports but a copy thereof is contained in the record page 281.

Statement.

The essential facts of the case are stated in the accompanying petition; and in the interests of brevity are not repeated here. Any necessary elaboration of the facts on the points involved will be made in the course of the argument which follows.

Summary of Argument.

The points of the argument follow the specifications of Error and the reasons relied upon for the allowance of the writ of certiorari.

ARGUMENT.

POINT 1

The Supreme Court of Pennsylvania erred in affirming and holding that, under the terms of the Act of Assembly, the trustee is not required to obtain permission from the court before investing the funds of the week-minded veteran in a mortgage secured upon real estate.

The Act of Assembly, to which reference is made, provides: (Act of June 13, 1836, PL 589, Sect. 34)

> "It shall be lawful for any committee, as aforesaid, by the leave and under the direction of the court of

> Common Pleas having jurisdiction, as aforesaid, to invest the money of a lunatic or habitual drunkard, in such stocks or UPON SUCH SECURITY AS SHALL BE APPROVED OF BY SUCH COURT, and if such investment be made bona fide, the committee making the same shall not be liable for any loss that may arise thereby."

This Act was first presented to the Supreme Court of Pennsylvania for judicial interpretation in *Commonwealth* v. *McConnell,* 226 Pa. 244 (1910). It was then specifically held that under the terms of this Act the guardian of a weak-minded person must obtain permission of the court before a mortgage investment, secured upon real estate, is made.

The specific question did not again come before the court until the appeal in this case was presented in January, 1943. No attempt was made to distinguish the facts of this case and that of *Commonwealth* v. *McConnell,* but the Supreme Court of Pennsylvania has attempted to furnish some reasons for repudiating its decision in the former case.

All the authorities mentioned by the Supreme Court of Pennsylvania as a reason for repudiating the decision in *Commonwealth* v. *McConnell* are mere obiter dicta. In all of them the court was adjudicating the duties of a testamentary trustee, which are not governed by the Act of Assembly herein involved. Therefore, they do not in any manner impair the adjudication in *Commonwealth* v. *McConnell, supra.*

The question of real estate security, upon the basis of which the mortgage investment in *Commonwealth* vs. *McConnell,* supra, was made, is not discussed in the opinion of the Supreme Court of Pennsylvania filed therein because the context of the Act makes no distinction in investments secured by real estate and those not secured by real estate.

Therefore, such a discussion would have been entirely irrelevant.

The opinion of the Supreme Court of Pennsylvania in the present case is liberally interspersed with such terms as "trust investments", "legal investments", "non-legal investments", "mandatory legislation", "permissive legislation", etc. But all this verbiage is a mere smoke-screen behind which the Court is repudiating its former opinion. By implication it admits that it is making a new rule for it says: "If any doubt whatever remains upon the construction of the Act of 1836, it should be resolved now, and definitely, by our holding that it does not require prior approval of the court of legal or statutory investments by guardians of weakminded persons" (R. 285-6).

Therefore, it is submitted that the Supreme Court of Pennsylvania has failed to distinguish either the law or the facts of the instant case from those of *Commonwealth* vs. *McConnell*, supra.

POINT II.

The Supreme Court of Pennsylvania erred when it retroactively modified its former judicial construction of the Act of Assembly and thereby impaired rights which had been acquired under it.

The petition for the appointment of the guardian for the weakminded veteran was presented by the appellant and petitioner in these proceedings to the court of Common Pleas No. 1 of Philadelphia County during the month of July, 1920. Upon its appointment the trustee furnished a bond for the faithful performance of its duties. In the event that the trustee violated these duties the petitioner, as one of the parties in interest could have proceeded upon the bond. Thus, a contractual relation was established.

Prior to the appointment of the trustee, the judicial construction of the Act of Assembly as set forth in *Common-*

wealth vs. *McConnell,* supra, had been acquiesced in for a long period of time and therefore the principles of this adjudication became a part of the Act itself. *Douglas* v. *Pike,* 101 U. S. 607. 677

It was not until twenty-two years after its appointment that the trustee filed its first account. Then, it was discovered that severe losses had been sustained by reason of mortgage investments which had been made without the permission of the court.

Under these circumstances, it is submitted that the Supreme Court of Pennsylvania should not now be permitted to repudiate its former adjudication and so relieve the trustee of the contractual obligations it assumed at the time it was appointed in 1920.

Your Honorable Court has said: "After a statute has been settled by judicial construction the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in effect on contract as an amendment of the law by means of legislative enactment". *Douglas* v. *Pike,* 101 U. S. 607.[1]

Therefore, it is submitted that the decision of the Supreme Court of Pennsylvania violates the specific decree of your Honorable court as announced in *Douglas* v. *Pike,* supra, in disregard of the fundamental rights of the appellant and petitioner.

Point III.

The Supreme Court of Pennsylvania erred in affirming and holding that the trustee, after neglecting to file an account for twenty-two years, should be permitted, under the provisions of the World War Act of 1924, to credit itself with spending money alleged to have been distributed out of the pension of the veteran without permission of the

1- FOR A DISCUSSION OF THE AUTHORITIES AND THE QUESTIONABLE PRECEDENT RELATING TO THE ISSUE INVOLVED, SEE: "RETROACTIVE OPERATION OF OVERRULING DECISIONS", 35 ILL. L. REV. 121-153 (1940); AND "LIMITED RETROACTIVITY OF OVERRULING DECISIONS; A DOCTRINE OF JUSTICE" 25 VA L. REV. 210-218 (1939).

court and without any testimony to indicate such expenditures were either reasonable or necessary.

The Supreme Court of Pennsylvania has failed to distinguish the law and the facts of the instant case from the law and the facts of *Reynolds* vs. *United States*, 292 U. S. 443.

There was presented to it the question of whether the trustee in the instant case should be permitted to credit itself with spending money alleged to have been distributed to the weak-minded hospitalized veteran out of his pension under the provisions of the World War Veterans' Act of 1924 and the amendments thereto.

The material portions of the Veterans' Act of 1924 (vol. 143, Stat. 607), which the petitioner and appellant believes are applicable to the instant case, are:

> Act of July 2nd, 1926, c. 723, Sec. 9, 44 Stat. 794.
>
> "Provided further, that where a veteran, hospitalized under the authority of this section, is financially unable to supply himself with clothing, he shall be furnished with such clothing as the administrator of Veterans' affairs may deem necessary * * *"
>
> "And provided further, that the pension of a Veteran entitled to hospitalization under this section shall not be subject to deduction, while such veteran is hospitalized in any Government Hospital for board, maintenance, or any other purpose incident to hospitalization."
>
> Act of May 23, 1928, Vol. 1, 45 Stat. at large, chap. 706, p. 716.
>
> "And further provided * * * that the Veterans' Bureau * * * 'shall also provide proper and suitable recreational centres' for those entitled to hospitalization under the terms of the Act."

In disposing of the question involved the Supreme Court of Pennsylvania, in its opinion, said:

> "There is no evidence that any part of the incompetent's pension was used for his board or maintenance at the hospital, which fact alone distinguishes this case from Reynolds *v.* United States, 292 U. S. 443, or that it was used to purchase anything which the hospital or Veterans' Bureau was obliged by law to supply. The federal officers charged with the care of the incompetent and with the administration of the Veterans' Act and its amendments have supervised and approved all of these expenditures."

The distinction attempted to be made is unsound because the question of board and maintenance of the Veteran is not involved in these proceedings. How the weak-minded person spent the money alleged to have been given him is equally unimportant. It is alleged that the trustee was requested by the medical officer to furnish spending money to the incompetent. But, the letter, upon which the trustee is alleged to have relied, does not mention the term "spending money" or its equivalent (R. 126). And, the Act does not authorize a federal officer in charge of the incompetent to supervise the distribution of spending money out of his pension.

Direct payments by the trustee to the weak-minded person are unauthorized, Guthrie's Estate, 16 Pa. 321. Likewise, direct payments to the Veteran are unauthorized under the provisions of the World War Veterans' Act. *Reynolds* vs. *U. S.*, supra, is directly in point because the pension money was there distributed under the supervision of the Veterans' Administration, as is alleged to have been done in the instant case. There were three items for which distribution was made, viz; cash, clothing and board. The Pennsylvania Supreme Court in its opinion erroneously assumes that distribution was made in *Reynolds* vs. *U. S.* for only two items, viz: clothes and board. By its adjudication

your Honorable Court in *Reynolds* vs. *U. S.*, supra, ruled that all three items must be returned to the hospitalized person under the provisions of the World War Veterans' Act.

Therefore, it is submitted that the Supreme Court of Pennsylvania has failed to distinguish the law and the facts of *Reynolds* v. *United States, supra,* from the law and the facts of the instant case.

Point IV.

The Supreme Court of Pennsylvania erred in refusing the petitioner a hearing upon his complaint which charged that an auditing judge and his court stenographer had wilfully omitted parts of the record so as to forestall an examination of the issues involved.

When the stenographic notes of testimony, which were taken by the court stenographer at the time of the audit of the account, were presented to the appellant and petitioner it was discovered that material parts of the record had been omitted. The attention of the auditing judge was immediately directed to these omissions and a petition was filed with him asking that the errors be corrected (R. 157). This petition was refused by him without a hearing (R. 166).

The appellant and petitioner then presented to the auditing judge requests for findings of fact and conclusions of law (R. 173). Without answering any of them, the auditing judge immediately entered a final judgment and at the same time approved the findings of an examiner whose report had been secreted in the office of the clerk of the court without having been entered upon the docket and without notice to the petitioner (R. 3).

Under these circumstances the appellant and petitioner immediately filed an affidavit with the Supreme Court of Pennsylvania charging gross irregularities and wilful mis-

conduct to the auditing judge, his examiner, and the clerk of the court (R. 265).

This petition was refused without a hearing and the court gave no reason for its action (R. 262). A copy of this petition will be found in the record at pages 265-277.

Therefore, it is submitted that the auditing judge should not be permitted to forestall an examination of the issues involved in the litigation before him by wilfully omitting material parts of the record and entering a final judgment without first ruling upon the requests for findings of fact and conclusions of law, which had been presented to him.

Point V.

The Supreme Court of Pennsylvania erred in refusing the petitioner a hearing upon his complaint which charged that an examiner appointed by the auditing judge had flagrantly disregarded the rules of court applicable to his office.

As will be observed from a casual examination of the petition to Strike the Report of the Examiner from the Record (R. 168), it is apparent that he flagrantly violated all the fundamental rules applicable to his office. This was done with full knowledge of the auditing judge who approved the report of the examiner at the time when he entered final judgment (R. 196). The appellant and petitioner had not received a copy of the instrument and he was entirely precluded from any discussion of the alleged findings of the examiner until after the entry of the final judgment.

The Supreme Court of Pennsylvania attempts to cover up this sordid procedure by holding in its opinion that the report of the examiner is of no consequence (R. 283).

> "There is no need to consider at length appellant's argument regarding irregularities in the reception of the examiner's report. The fact that the auditing

judge ambiguously designated him as an 'examiner or auditor' and 'approved' his report cannot obscure the fact that his function was solely that of an examiner, and adviser to the court, and not an auditor, empowered to hear and make recommendations on claims. Appellant is therefore mistaken in assuming that the rules of the court below applicable to auditors were violated."

It was the duty of the auditing judge to adjudicate the questions of Law presented to him by the petitioner. But, it seems that he delegated this authority to an irresponsible agency which "advised" the court how it should decide the issues involved. Since it is admitted that the court approved the account of the fiduciary at the same time it approved the report of the examiner, it is submitted that the petitioner herein is entitled to know the basis upon which the examiner or "adviser" made his report to the court.

As the appellant and petitioner herein presented to the court a Rule to Show Cause Why the Examiner's Report should not be Stricken from the Record, it is submitted that the Supreme Court of Pennsylvania is in error when it refused this Rule without a hearing and without some explanation other than that which is mentioned in the opinion of the court.

POINT VI.

The Supreme Court of Pennsylvania erred in permitting the auditing judge to cover up his misconduct by falsely representing that there had been a formal hearing before the court en banc and then affirming fictitious findings alleged to have been made by the court en banc.

Should any further demonstration be required of the sinister methods employed to defeat an impartial audit of the account which is involved in these proceedings, it will be

found in that part of the record wherein the auditing judge falsely represents that a hearing of some kind was held before the court en banc.

In disposing of the irregularities incident to the entry of the "final judgment", the Supreme Court of Pennsylvania said (R. 283):

> "The auditing judge should not have designated his adjudication of the account as a "final judgment", but as appellant filed no exception to it, he cannot complain that the Court en banc did not hear him"

and (R. 282)

> "An opinion sustaining the action of the auditing judge was filed by the court below."

and (R. 282)

> "As appellant has not included in the statement of questions involved and assignments of error his objection to the manner in which this case was disposed of by the court en banc, this court cannot consider it on appeal."

The entry of the "final judgment" and the refusal of the auditing judge to rule upon the questions of fact and law presented to him are included in the assignments of error and the Statement of the Questions Involved. These were submitted to the Supreme Court for adjudication.

In this connection it should be noted that the docket entries disclose the final judgment was entered by the auditing judge on July 28, 1942; an appeal to the Supreme Court of Pennsylvania was filed on August 4, 1942; at the same time an affidavit reciting the irregularities incident to the entry of the final judgment was filed; and, the opinion of the auditing judge was filed on October 7, 1942 (R. 278).

A further examination discloses that the docket entries make no reference to a hearing before the court en banc.

The first notice of such proceedings will be found at the top of the auditing judge was filed on October 7, 1942 (R. 278). (R. 278). Thus, it will be seen that the first and only notice of a proceeding before the court en banc was received by the petitioner and appellant herein more than two months after his appeal to the Supreme Court of Pennsylvania; and, that the alleged hearing before the court en banc is presumed to have taken place after the entry of the final judgment in the lower court and after an appeal based upon this final judgment had been entered with the Supreme Court of Pennsylvania.

Failure to give notice to the petitioner of the hearing before the court en banc and the peculiar circumstances under which that hearing is alleged to have been held, constitute a deprivation of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

The meaning of due process is well explained in *Ochoa* v. *Morales*, 230 U. S. 161 (1913), wherein the court said:

> "Whatever else may be uncertain about the definition of the term 'due process', all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or any opportunity for a hearing."

It is settled beyond question, and does not require an extensive citation of authorities to establish the proposition that the due process clause of the Fifth Amendment requires that notice and an opportunity to be heard be given to those whose rights are affected. *Roller* v. *Holly*, 176 U. S. 398-409; *Central of Georgia Ry.* v. *Wright*, 212 U. S. 127-138.

An extra-judicial or casual notice, or a hearing granted as a matter of favor or discretion, will not be regarded as a substantial compliance with the notice the Constitution re-

quires, *Coe* v. *Armour Fertilizer Works,* supra. The notice must be such that the parties have an opportunity by proof and argument to controvert the claim asserted against them and to give legal effect to the findings established by the weight of the evidence. *Washington* v. *Fairchild,* 224 U. S. 510 (1912).

In the proceedings now before the court, the auditing judge by refusing to adjudicate the questions of law and fact which were presented to him in accordance with the rules of court, thereby prevented the petitioner from taking exceptions to his findings. By this artifice, the petitioner was deprived of a hearing before the court en banc.

Within twenty-four hours after the requests for findings of fact and conclusions of law had been presented to him, the auditing judge entered "final judgment". Two months after the entry of the "final judgment" and while the petitioner was awaiting a hearing before the Supreme Court, the auditing judge filed an opinion, across the face of which was a notation that there had been some proceeding before the court en banc (R. 197). This was the first and only notice of the alleged hearing received by the Petitioner. It is a wilful falsehood designed to conceal the misconduct of the auditing judge.

In its discussion of the subject matter, the Supreme Court of Pennsylvania said (R. 283):

> "Although the court entered no final decree, this court will construe the opinion of the court en banc to be an adoption of the 'final judgment' of the auditing judge as its final decree."

This opinion is based upon a fiction created by the auditing judge. All the surrounding circumstances indicate there never was a hearing before the court en banc. The appellate court should have taken cognizance of that fact and promptly made an investigation as it was respectfully requested to do at the time when these irregularities were brought to its attention (R. 263-277).

It is, therefore, submitted that the Petitioner under the Fifth Amendment was entitled to notice of any proceedings to be held by the court en banc; that he did not receive such notice in accordance with the settled usages and modes of procedure; and, that this right cannot be taken from him either by the arrogance of an auditing judge or the decree of the State court.

Point VII.

The Supreme Court of Pennsylvania erred in ignoring the fundamental principles of law and its former adjudications, capriciously shifting the burden of proof, and exercising its own discretion as to the allowance of credits claimed by the fiduciary.

The Petitioner filed exceptions to the account of the fiduciary and charged that credits claimed for repairs, alleged to have been made to the trust properties, are fradulent. (R 91).

According to the established practice, the burden was upon the fiduciary or claimant to prove that the work was properly performed and that the prices charged were fair, just and reasonable. Hart's Estate, supra.

To sustain its burden, the fiduciary produced receipted bills and vouchers which were identified by one of its trust officers and which applied to but one of the properties involved. But it did not call a single witness to prove either that the work was properly performed or that the charges were fair, just and reasonable.

In the requests for findings of fact and conclusions of law, presented to the auditing judge, as aforesaid, the petitioner requested that the credits claimed by the fiduciary be disallowed. (R. 191-192).

Without answering these requests and with no evidence before him to sustain the charges for the credits claimed,

the auditing judge awarded full payment both as to the property for which only the receipted bill was produced and all other properties mentioned in the account for which not even a receipted bill was produced.

In the face of charges that the work was not performed and that the credits claimed are fradulent, it requires no citation of authorities to establish the proposition that the production of receipted bills does not prove that the work was properly performed and that the prices charged are fair, just and reasonable. If this were true, the fiduciary might, by the mere production of a sufficient number of receipts, claim the entire estate.

The question was presented for adjudication to the Supreme Court of Pennsylvania both in the assignments of error (R. 215-216) and in the Statement of the Questions Involved (R. 203). In disposing of this question, the court said (R. 286):

> "The charge of appellant that certain expenditures for repairs to the Gordon Street property were not made was disproved by the testimony of accountant's witness, and by the statement of the counsel for the Veterans' Administration that he had investigated the same charge and found it baseless. The only evidence offered in support of the exception to this item was appellant's own testimony that he had visited the property two years after the work was done and found no evidence of repair, and that he had conversed with an unnamed neighbor who said that no repairs had been made for five years. The neighbor was not called to testify. Clearly the court below was correct in allowing this credit."

The trust officer of the accountant, to whose testimony the court refers in its opinion, never so much as visited the property and had no direct knowledge as to whether the work was properly performed and whether the charges were

correct. (R. 142-143). He merely produced receipted bills. Counsel for the Veteran's Administration, to whose statement reference is made, did not take the witness stand because he, like the trust officer, was incompetent to testify upon the question. And, no explanation was made as to why the contractor, to whom the payments are alleged to have been made, was not called to prove that the work was performed, as alleged. There is not a scintilla of evidence in the record to sustain the claims of the fiduciary. The auditing judge was requested to so find, but he found it inconvenient to answer the question. (R. 191-192).

In the audit of this trust estate, the Supreme Court of Pennsylvania has permitted the lower court to depart from the settled practice and the fundamental principles of law. Instead of requiring the fiduciary to prove its claim in the same manner as every other litigant would be required to do, the burden is shifted to the Petitioner; and, the court, in its opinion, holds that he has failed to prove that the work was not performed and that the charges are not just, fair and reasonable.

The injustice of the situation becomes apparent when we consider that for twenty-two years the trustee neglected to file an account, so that, the petitioner, during this long period, was kept in total ignorance as to what investments had been made by the trustee. By a fortuitous chance, he located one of the properties, made and examination and reported to the trust officer a condition which indicated that the trust estate was being defrauded. (R. 140-141). Even then the fiduciary neglected to examine the property or verify the complaint.

It is the duty of the auditing judge and the appellate court of the State to administer the law and apply it impartially to all litigants. In these proceedings it seems to have favored one litigant at the expense of another. The late Justice

(1) FOR A DISCUSSION OF THE AUTHORITIES AND THE QUESTIONABLE PRECEDENT RELATING TO THE ISSUE INVOLVED, SEE: "RETROACTIVE OPERATION OF OVERRULING DECISIONS", 35 ILL. L. REV. 121-153 (1940); AND "LIMITED RETROACTIVITY OF OVERRULING DECISIONS; A DOCTRINE OF JUSTICE" 25 VA L. REV. 210-218 (1939).

Holmes, in construing the Fourteenth Amendment to the Constitution, very appropriately, remarked:

> *Louisville R. R. Co.*, v. *Stock Yards Co.*, 212 U. S. 132-144.
>
> "The law itself must save the parties and not leave them to the discretion of courts as such."

Since the Amendment requires equal protection for all, without exception, it is submitted that in the adjudication of this estate that wholesome provision has been flagrantly violated.

Since it was error for the Supreme Court of Pennsylvania to affirm and hold that the trustee was not required under the Act of Assembly to obtain permission of the court before investing the trust funds in a mortgage secured upon real estate; since it was error for the Supreme Court of Pennsylvania to retroactively modify its former adjudication and thus impair rights which had been acquired under it; since it was error for the Supreme Court of Pennsylvania to affirm and hold that the trustee under the provisions of the World War Act of 1924 should be permitted to credit itself with spending money distributed out of the pension of the veteran without permission of the court and without any evidence that such expenditures were either necessary or reasonable; since it was error for the Supreme Court of Pennsylvania to refuse the petitioner a hearing upon his complaint that the auditing judge and his court stenographer had wilfuly omitted parts of the record; since it was error for the Supreme Court of Pennsylvania to refuse the petitioner a hearing upon his complaint that the auditing judge had permitted his examiner to flagrantly disregard the rule of court; since it was error for the Supreme Court of Pennsylvania to permit the auditing judge to falsely represent that there had been a formal hearing before the court en banc, when no such proceeding had ever

been held; and, since it was error for the Supreme Court of Pennsylvania to ignore the fundamental principles of Law and its former adjudications, capriciously shift the burden of proof and exercise its own discretion as to allowance of credits claimed by the fiduciary for alleged repairs to the trust properties;

Conclusion.

It is respectfully submitted that the Writ of Certiorari prayed for in the Petition should issue.

Respectfully submitted.

NORMAN J. GRIFFIN,
WM. S. FENERTY,
Counsel for Petitioner.

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Office - Supreme Court, U.S.
NOV. 5
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 185

ALLEN M. SNYDER,

Petitioner,

vs.

THE PROVIDENT TRUST CO., SUCCESSOR TO THE COMMONWEALTH TRUST CO., GUARDIAN OF THE ESTATE OF MILLARD P. SNYDER, A WEAK-MINDED PERSON.

PETITION FOR RECONSIDERATION OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

NORMAN J. GRIFFIN,
WM. S. FENERTY,
Counsel for Petitioner.

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PETITION FOR RECONSIDERATION OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Allen M. Synder, the petitioner, by his attorneys, respectfully prays that your Honorable Court reconsider its refusal to grant him a Writ of Certiorari to review the judgment of the Supreme Court of Pennsylvania, affirming a judgment of Common Pleas Court No. 1 of Philadelphia County in favor of the respondent, entered upon a judgment in its favor by the auditing judge.

Jurisdiction

The decision of the Supreme Court of Pennsylvania was filed on March 22, 1943. A petition for a re-hearing was filed on April 1, 1943, and denied on April 13, 1943. The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. Section 344). The time for filing a petition for a writ of certiorari was extended, by order of the court, until July 23, 1943. The petition for a writ of certiorari was denied by your Honorable Court on October 11, 1943.

Statement of Facts

This case arose on appeal from a decree of Common Pleas Court No. 1, of Philadelphia County, confirming the account of the Provident Trust Company, successor to the court-appointed trustee, the Commonwealth Trust Company, guardian of the estate of Millard P. Snyder, a weak-minded person; said guardian, or trustee, having been appointed July 19, 1920. Twenty-two years after its appointment, i.e., on May 19, 1942, the fiduciary filed its first and only account. To this the petitioner filed exceptions. (R. 90-92).

An Act of Assembly of the State of Pennsylvania, as is more specifically set forth in the original petition for certiorari, provided that the guardian of a weak-minded person must first obtain permission of the court before investing the trust funds. This Act had been judicially construed by the highest court of the State. The fiduciary, in disregard of the Act of Assembly and adjudication of the court, made investments of trust funds without permission of the court.

The delinquency of the fiduciary was brought to the attention of the Supreme Court of Pennsylvania, which thereupon retroactively modified its former adjudication construing the Act of Assembly and so relieved the fiduciary of liability for losses which had been incurred by reason of the aforesaid investments.

The petition for writ of certiorari, denied by your Honorable Court, as aforesaid, was predicated upon the proposition that "The Supreme Court of Pennsylvania erred when it retroactively modified its former judicial construction of the Act of Assembly and thereby impaired rights which had been acquired under it."

This petition, wherein it is now sought to have your Honorable Court reconsider its denial of the writ of certiorari, presents the following question:

Principal Question Presented

Is it consistent for your Honorable Court to deny a petition for a writ of certiorari to a State Court, holding that it is constitutional for a State Court to give retrospective operation to an over-ruling decision while at the same time holding that it is unconstitutional for a federal court to do the same thing with the same court decision?

Reasons for Allowance of the Writ

The jurisdiction of your Honorable Court to issue a writ of certiorari to the Supreme Court of a State, which has retroactively modified its former judicial construction of an Act of Assembly, does not depend upon any specific constitutional provision; that jurisdiction to issue such a writ, according to the former adjudications of your Honorable Court, rests upon the plainest principles of justice; and that an injustice has been done to the petitioner in this case by the Supreme Court of Pennsylvania when it retroactively modified its former judicial construction of an Act of Assembly and so relieved the fiduciary in these proceedings of its responsibility for losses incurred to the trust estate.

ARGUMENT

POINT I

Where a State court has retroactively modified its judicial construction of an Act of Assembly, and thereby impaired rights acquired under it, your Honorable Court has, heretofore, taken jurisdiction only in those cases which have arisen in the Federal Courts.

Heretofore, your Honorable Court has taken jurisdiction in those cases which, involving the issue, have arisen in the federal courts. *Douglass vs. Pike County*, 101 U.S. 677; *Gelpcke vs. Dubuque*, 1 Wall. 175, 206 (U.S. 1863).

Jurisdiction has been denied in those cases which, involving the issue, have arisen in the State Courts. *Tidal Oil vs. Flanagan*, 263 U.S. 444, 451-452 (1924); 44 S. Ct. 197-199.

Jurisdiction was denied in the Flanagan Case, supra, and others which followed it, because: "It has been settled by a long line of decisions that the provisions of Sect. 10, Article I, of the Federal Constitution, protecting the obligation of contracts against State action, is directed only against impairment by State Legislation and not by judgment of courts. The language . . . 'No State shall . . . pass any . . . law impairing the obligations of contracts . . .' plainly requires such conclusion."

The reason expressed in the Flanagan case, supra, is unsound because the question of constitutional right cannot be different whether the cases come up to your Honorable Court one way or the other. It cannot be constitutional for a State Court to give retrospective operation to its overruling decision but unconstitutional for a Federal Court to do the same thing with the same court decision. The reason for the Federal Court's refusal to give retrospective operation must be some rule other than that mentioned in the Flanagan case, supra. This reason cannot be the impairment guaranty, which does not apply to the Federal Government; and it cannot be the due process guaranty, which

applies to both Federal and State Governments, for, if this were the reason, the Rule as to retrospection must then be the same in the State and Federal Courts and your Honorable Court has held that the State Courts need not follow the Federal Rule.

Either your Honorable Court should take jurisdiction in cases coming up from the State Courts or it should deny jurisdiction in cases coming up from the Federal Courts. This brings us to a consideration of the reason why your Honorable Court has taken jurisdiction in cases which have come up from the Federal Courts.

POINT II

That jurisdiction in those cases arising in the federal courts is not based upon any specific constitutional provision. It rests solely and exclusively upon the plainest principles of justice.

The jurisdiction which your Honorable Court has taken in these cases "rests upon the plainest principles of justice". *Gelpcke vs. Dubuque*, supra. In *Tidal Oil vs. Flanagan*, supra, it was said that jurisdiction is taken in those cases coming up from the lower Federal Court "where gross injustice would otherwise be done." In commenting upon the reason for the rule your Honorable Court has said: "Such a rule is based upon the highest principles of justice." *Olcott vs. Supervisors*, 16 Wall. 678-690. (U.S. 1872). The Supreme Court of Iowa has said: "The opinion professes to be planted . . . upon truth, justice and law". *McClure vs. Owen*, 26 Iowa 243-258 (1868). In 1906 the same court denominated the exception as "a sort of equitable doctrine". *Swanson vs. Ott, U.M.W.A.*, 131 Iowa 540. The Supreme Court of Kansas has called it "Only a Rule of Policy". *Crigler v. Shepler*, 79 Kan. 834. The Supreme Court of North Carolina has referred to it as a Rule "based upon the highest principles of justice". *Hill vs. Atlantic & North Carolina R. R. Co.*, 143 N.C. 539, and the Supreme Court of Appeals

of West Virginia has declared that "it is difficult to sustain this exception on principle . . . it is plainly an exception made by the courts at the call of justice". *Falconer vs. Simmons*, 51 W. Va. 172.

From the foregoing cases the conclusion is that the jurisdiction of your Honorable Court with respect to cases, involving this issue and which come up from the lower federal courts, is grounded solely and exclusively upon "the plainest principles of justice", and not upon some provision of the Constitution. It has developed its own independent jurisdiction and this should be exercised, in the interest of justice, as to the cases which originate in either the State or in the Federal Courts.

POINT III

That these plainest principles of justice are inflexible and should apply to all cases without regard to the question of whether they arise in a federal or a state court.

Are these "plainest principles of justice", which are mentioned in the Gelpcke case, supra, and which are affirmed in many other cases, so flexible that they can have two separate meanings which may alternately be applied to the same question at the same time? The answer to this question does not depend upon a provision of the constitution.

When the Supreme Court of Pennsylvania retroactively modified, in these proceedings, its former judicial construction of the Act of Assembly and relieved the trustee of responsibility for losses to the trust estate, incurred by reason of its violation of the Act, "the plainest principles of justice" require your Honorable Court to examine this adjudication.

On a question of res adjudicata, which came to your Honorable Court from a State Court and which is closely connected with the issue herein involved, Chief Justice Hughes said: "I think we are not at liberty to assume that

the Oklahoma Court would so far depart from the plain requirements of justice. . . ." *Oklahoma Packing Co. vs. Oklahoma Electric Co.*, 309 U.S. 4, 11 (1940). On a similar question of res adjudicata, which came to your Honorable Court from a Federal Court, Chief Justice Hughes said: "The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling . . . may have to be considered in various aspects. . . ." *Chicot County vs. Baxter State Bank*, 308 U.S. 371-374 (1940). The Supreme Court of Alabama has said that retrospective operation of over-ruling decisions "must be radically wrong. Such a principle or rule of law . . . would destroy all confidence in the decision of the Supreme Court of the State." *Farrior vs. New England Mortgage Co.*, 92 Ala. 176. The Supreme Court of Montana, without assigning other grounds, said: "It would be manifestly unjust and improper to deprive (a litigant) of its legal right . . . simply because of the later opinion expressed by the court repudiating its former decision." *Montana Products Co. vs. Great Northern Ry. Co.*, 91 Mont. 194.

POINT IV

These plainest principles of justice require that, in these proceedings, your Honorable Court should issue a writ of certiorari to the Supreme Court of Pennsylvania which has retroactively modified its former judicial construction of an Act of the State Assembly and thereby impaired rights which have been acquired under it.

It is, therefore, respectfully submitted that "the principles of justice" are the sole and exclusive basis of the exception in the Federal courts; that these "principles of justice" are invariable; that they apply to all cases regardless of whether they originate in a State or a Federal Court; that jurisdiction does not depend upon any particular constitutional provision; and that it is inconsistent for your Honorable Court to deny, to the petitioner herein, a writ of

certiorari to the Supreme Court of Pennsylvania, holding that it is constitutional for that Court to give retrospective operation to an over-ruling decision in his case, while at the same time holding that it is unconstitutional for the local Federal Court to do the same thing with the same court decision.

Conclusion

For these reasons, your petitioner respectfully prays that your Honorable Court reconsider its denial of his petition and now issue a writ of certiorari to the Supreme Court of Pennsylvania in these proceedings.

Respectfully submitted,

NORMAN J. GRIFFIN,
WM. S. FENERTY,
Counsel for Petitioner.

Certificate of Counsel

CITY AND COUNTY OF PHILADELPHIA }
STATE OF PENNSYLVANIA } *ss.:*

NORMAN J. GRIFFIN, being duly sworn according to law, deposes and says that he is counsel of record for the petitioner in the foregoing proceedings; that he verily believes an injustice has been done; and that the petition is filed in good faith and not for the purpose of delay.

NORMAN J. GRIFFIN

Sworn and subscribed
before me this 4th day
of November, 1943.

WILLIAM COHEN
Notary Public